FOR ARGUMENT

Supreme Court, U.S.
FILED
MAR 26 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1979

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NO. 79-677

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REEVES, INC.,

Petitioner,

vs.

WILLIAM STAKE, RICHARD SAYRE, THOMAS ZELLER, AL SANDVIG, EDWIN GAISER, JOSEPH SIMMONS, ROGER PRUNTY, Members of the South Dakota Cement Plant Commission,

Respondents.

—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

BRIEF FOR THE RESPONDENTS

—o—

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JURISDICTION

The Judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 7, 1979 (App. 49).

The petition of Reeves, Inc. for a writ of certiorari was filed on October 25, 1979, and granted on January 14, 1980.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

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QUESTION PRESENTED

1. Does the State of South Dakota violate the Commerce Clause of the United States Constitution, Art. I, Sec. 8, Clause 3, by participating in the market and exercising the right to favor its own citizens over others in the sale of products manufactured and owned by the State?

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STATEMENT

In the general election of 1918, the citizens of South Dakota passed a constitutional amendment, Article XIII, Section 10, declaring the manufacture, distribution and sale of cement and cement products to be "works of public necessity and importance in which the state may engage" and authorizing the State legislature to expend State funds to acquire lands, equipment and facilities necessary to the establishment of a cement manufacturing plant. The 1919 South Dakota legislature adopted the enabling legislation creating the South Dakota Cement Commission. *South Dakota Compiled Laws* 5-17-1 et seq. The Respondents are the present members of that Commission.

The impetus behind the original establishment of the South Dakota Cement Plant in the early 1920's was the

critical shortage of cement within the State. There existed no private cement manufacturer in the State, resulting in a cement shortage interfering with both private and public projects in South Dakota.[1]

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1 The conditions that existed in South Dakota prompting the State to establish the South Dakota Cement Plant were delineated by the South Dakota Supreme Court in *Eakin v. South Dakota State Cement Commission,* 44 S. D. 268, 183 N. W. 651, 652 (1921), wherein the Court upheld the enabling legislation against a state taxpayer's due process challenge. The Court's opinion included the following findings:

[1] That cement and its products are commodities that are necessary *to the people of this state;* that they cannot be procured through individual effort.

[2] that, in the construction of highways, bridges, street paving, sidewalks, and public buildings *within this state,* cement is a necessary material, and for such construction there are required more than 1,000 barrels of cement per day; that cement and cement products are also necessary materials for the construction of homes and other structures not hereinbefore referred to,

[3] that the use of cement is rapidly increasing *in this state as elsewhere;* that a serious shortage in the supply of cement is threatening *the people of this state;* that there has been such a shortage many times during the past two years and at times such shortage has interfered with and delayed both public and private enterprises;

[4] that the materials for the making of cement are found in large quantities and at accessible points *within this state;* that gravel, an essential part of cement construction, is found in abundance and distributed throughout the different portions *of this state,* thus making practicable the manufacture of cement and cement products *within this state;*

[5] that there are no privately owned and operated cement plants *within this state* or within some 175 miles of the borders thereof; and

[6] that the manufacture, distribution and sale of cement and cement products by the state will tend to promote the public welfare, prosperity, and contentment *of all the citizens of the state,* and will tend to secure equality of economic opportunity. [Emphasis supplied.]

While the cement plant was originally established for the express purpose of relieving the critical cement shortage within the State of South Dakota, it was soon recognized that there existed a ready market for any surplus supply in neighboring states.[2] Consequently, since the construction of the plant in 1920, the State has practiced a sales policy whereby the needs of South Dakota citizens would be met first with the surplus sold to out of State purchasers.

Prior to 1978 South Dakota was able to meet the South Dakota demand as well as selling the surplus out of State. During 1978, however, the demand for cement in South Dakota, together with contractual commitments outside the State and production problems at the plant itself, resulted in a period of unprecedented demand on the plant's capacity. By June 1, 1978, it became apparent that the public and private demands for cement in South Dakota would exceed the plant's capacity (App. 30-34). The State was thus faced with the same cement shortage situation that caused it to establish the plant in 1920. The public purpose for which the cement plant was originally created, that is, to manufacture and sell cement to the citizens of South Dakota, was recognized by the Commission. This public purpose dictated and prompted the Commission to reaffirm its longstanding policy of first

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2 The 1920 report of the State Cement Commission to the Governor stated:

> "That there would be a ready market for the entire output of the State within the State.
>
> That in case there is a surplus, a ready market is available in adjoining states." (App. 31)

supplying South Dakota customers and existing contractual purchasers, both resident and nonresident, with any remaining volume allocated on a first come, first served basis[3] (App. 13).

Reeves, Inc. is a Wyoming corporation which has purchased cement from the South Dakota Cement Plant since 1958. Reeves, Inc. did not have a contractual commitment with the cement plant in 1978 and therefore the cement plant was unable to supply Reeves, Inc. during that year in accordance with the sales policy reaffirmed by the Cement Commission on June 1, 1978. On July 19, 1978 Reeves, Inc. filed suit against the Commission in the United States District Court for the District of South Dakota seeking declaratory and injunctive relief (App. 3-10). On July 21, 1978, the District Court entered an order permanently enjoining the South Dakota Cement Commission from using a policy that would prohibit the sale of cement to Reeves, Inc. solely because the corporation is not an entity within the State of South Dakota. The District Court declared such a policy with respect to Reeves, Inc. to be a violation of the Commerce Clause and the Privileges and Immunities Clause of the United States Constitution (App. 27-30).

In response to the District Court's decision, the Commission adopted a "priortization" policy whereby both resident and nonresident purchasers were supplied based on past usage. Implementation of this policy or any other policy requiring out-of-state sales before the needs of

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3 This same policy had been expressed at a previous meeting of the South Dakota Cement Commission on June 26, 1974. (App. 24-25)

South Dakota purchasers were met was, except as to Reeves, Inc., enjoined by order of the Circuit Court of the Sixth Judicial Circuit of South Dakota as violative of the constitution and laws of the State of South Dakota (See Appendix A and B to Petitioner's brief). Thereafter, other nonresident purchasers filed suit in United States District Court and were granted injunctive relief similar to that granted Reeves, Inc. *Russell's Ready Mix, Inc. v. Kelley, et al.*, No. 78-5073 (D. S. D. Sept. 28, 1978), and *Mullinax Concrete Service Co. v. Kelley, et al.*, No. 78-5074 (D. S. D. Sept. 22, 1978).

On appeal to the Eighth Circuit Court of Appeals, these cases were consolidated with *Reeves, Inc. v. Kelley, et al.* for argument and decision. The Court of Appeals reversed the District Court, holding that the Commerce Clause does not prohibit South Dakota from participating in the market and exercising the right to favor its own citizens over others. *Reeves, et al. v. Kelley, et al.*, 586 F. 2d 1230 (8th Cir. 1978) (App. 35-41). The injunctive relief granted by the District Court was vacated and the Petitioner's claim was dismissed for failure to state a claim for relief (App. 42-43).

A Petition for Writ of Certiorari on behalf of Reeves, Inc. was filed in the Supreme Court of the United States. On May 14, 1979 the Supreme Court entered an order granting the Petition for Writ of Certiorari, vacating the judgment of the Court of Appeals, and remanding the case to the Court of Appeals for further consideration in light of *Hughes v. Oklahoma*, 441 U. S. 322, 99 S. Ct. 2155, 60 L. Ed. 2d 1041 (1979); *Reeves, Inc. v. Kelley*, 441 U. S. 939, 99 S. Ct. 2155, 60 L. Ed. 2d 1041 (1979) (App. 43).

In its opinion on remand, the Eighth Circuit Court of Appeals carefully considered the Supreme Court's decision in *Hughes v. Oklahoma*, supra. The Court of Appeals discerned significant differences between the cases. *Hughes v. Oklahoma* dealt with a direct State attempt to restrict the out-of-State sale of a natural resource after it had been reduced to private possession. In contrast, the State of South Dakota made no attempt to regulate or control the private sale of cement. Basing its decision on this fundamental distinction between the types of activity the Commerce Clause was intended to restrict, the Court of Appeals abided by its previous holding that the Commerce Clause does not prohibit South Dakota "from participating in the market and exercising the right to favor its citizens over others." *Hughes v. Alexandria Scrap*, 426 U. S. 794, 810, 96 S. Ct. 2488, 49 L. Ed. 2d 220; *Reeves v. Kelley*, 603 F. 2d 736 (8th Cir. 1979) (App. 44-48).

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SUMMARY OF ARGUMENT

I.

This case presents a Commerce Clause challenge to a State action unlike that presented in most previous Commerce Clause controversies. South Dakota has not attempted to usurp federal regulatory powers or enact legislation regulating interstate commerce in cement. Rather, South Dakota entered the market as a seller of a State manufactured product and, at a time when it could not meet the demands of all of its past customers, chose to limit its sales to South Dakota residents.

In *Hughes v. Alexandria Scrap Corp.,* 426 U. S. 794, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976), the Supreme Court established the principle that a State acting as a participant, as distinguished from a regulator, in the marketplace, is not restrained by the negative implications of the Commerce Clause from favoring its own citizens. The decision reached in *Hughes v. Alexandria Scrap,* supra, is based upon the fundamental distinction between the type of State activity involved. When a State regulates the general citizenry in the marketing of privately owned commodities in trade, it is subject to Commerce Clause review to assure that the State does not enact legislation tending to unduly inhibit trade between citizens of different States. However, when a State is carrying out its own business, rather than regulating the business of others, the State as a buyer or seller of its own product is subject to no greater Commerce Clause review than private citizens engaged in similar conduct.

This distinction between the types of State activity with which the Commerce Clause is concerned is founded upon the historical purposes of the Commerce Clause itself. The Clause was directed at the regulatory and taxing authority of States. The Clause was never intended to withdraw from the States the power to distribute State owned assets in a fashion that it deems appropriate.

The activity of South Dakota may be properly viewed as creating new commerce, rather than restricting existing commerce. The very commerce that is now claimed to be burdened would not have existed had not South Dakota originally elected to become a manufacturer and seller of cement. Petitioner has chosen over the years to purchase nearly all of its cement requirements from South Dakota.

However, Petitioner's status as a long-standing customer does not ripen into a constitutional right to purchase whenever South Dakota lacks a supply of cement to meet all available demand.

The precedents relied upon by the Petitioner are inapplicable to the type of State action involved in the present case. In each of the cases cited by the Petitioner, the State has acted either directly or indirectly as a regulator of the general public in the marketing of products in interstate commerce. In the present case South Dakota is acting in a proprietary capacity as a Seller of a product in the marketplace. South Dakota makes no attempt to regulate the conduct of those with whom it deals.

II.

The decision in *Hughes v. Oklahoma,* 441 U. S. 332, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979) does not represent a departure by the Court from its previous holding in *Hughes v. Alexandria Scrap Corp.,* supra. In *Hughes v. Oklahoma,* supra, Oklahoma restricted the out-of-state sale of wildlife that had been reduced to private possession and ownership. The Court rejected as a legal fiction the notion that a State maintains an ownership interest in wildlife after it comes into private hands such that the State could limit its sales to residents. In the present case, South Dakota's ownership of its own manufactured product is based on simple fact, not legal fiction. South Dakota has not attempted to assert that through some legal fiction its ownership interest in cement continues after the product comes into private possession such that it could thereafter prohibit cement sales to nonresidents. Rather South Dakota maintains that in the absence of con-

gressional action, the Commerce Clause does not prohibit the State from favoring its own citizens in the sale of its own product.

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ARGUMENT

I.

The State of South Dakota does not violate the Commerce Clause by participating in the market and favoring its citizens over others in the sale of its own manufactured product.

This case involves the nature of Commerce Clause limitations on the right of a State to favor its own citizens over citizens of other States in the sale of a State-owned and manufactured product. It is necessary at the outset to clearly identify the type of State activity involved. South Dakota has not attempted to pass any regulation or prohibition on any private industry functioning in commerce. Neither has South Dakota attempted to interfere with or usurp federal regulatory power. Rather, this Court is presented with a factual situation unlike most previous Commerce Clause controversies. In the present case, the Commerce Clause challenge is to a State which as a manufacturer-seller faced with production demands it could not meet, made an administrative decision to follow a sales policy that gave priority to meeting the demands of South Dakota customers. Thus the issue posed is what restraints, if any, are imposed by the Commerce Clause on a State's right to favor its own

citizens in the sale of its own manufactured products, in the absence of any conflicting federal legislation.

Previous decisions of this Court has established the principle that a State acting as a participant, as distinguished from a regulator, in the marketplace, is not restrained by the negative implications of the Commerce Clause from favoring its own citizens. In *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976), this Court rejected the argument advanced by the Petitioner herein that every action of a State that may have an effect on interstate commerce is subject to Commerce Clause review, stating:

> "This line of reasoning is not without force if its basic premise is accepted. That premise is that every action by a State that has the effect of reducing in some manner the flow of goods in interstate commerce is potentially an impermissible burden. But we are not persuaded that Maryland's action in amending its statute was the kind of action which the Commerce Clause is concerned." 426 U. S. at 805, 96 S. Ct. at 2495, 49 L. Ed. 2d at 228-29.

The Supreme Court in *Hughes v. Alexandria Scrap, Corp.*, supra, reviewed the same cases relied upon by the Petitioner herein and concluded that "[t]he common thread of all of these cases is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation." 426 U. S. at 806, 96 S. Ct. at 2496, 49 L. Ed. 2d at 229. The Court then drew a clear distinction between the historical evils the Commerce Clause was designed to prevent and the type of State action presented in the case then before it:

> "But until today the Court has not been asked to hold that the entry by the State itself into the

market as a purchaser, in effect, of a potential article of interstate commerce creates a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the State.

We do not believe the Commerce Clause was intended to require independent justification for such action." 426 U. S. at 808-09, 96 S. Ct. at 2497, 49 L. Ed. 2d at 230-31.

The decision in *Hughes v. Alexandria Scrap,* supra, bears directly upon the issues presented in this case.[4] The Court drew a sharp distinction between two types of State activity affecting interstate commerce. In the first type, the State through its rulemaking powers enacts legislation aimed at regulating private conduct in the marketplace. In the second type of State activity, the State directly enters the market as a participant to buy or sell goods and services in the marketplace. The Court concluded that the first type of activity was properly the subject of Commerce Clause review, while the second type of State activity was not the type of conduct to which the restraints of the Commerce Clause have been historically directed. By applying this fundamental distinction to the present case, it becomes apparent that South Dakota has not exercised its governmental powers to restrict commerce, but rather has acted in a purely proprietary capacity as a seller in the marketplace, and in such capacity is not subject to Commerce Clause review.

4 While the state of Maryland acted as a purchaser in *Hughes v. Alexandria Scrap,* supra, and here South Dakota is acting as a seller, the distinction is not significant since, as noted by the court below, the holding in *Hughes v. Alexandria Scrap,* supra, was based upon the distinction between a state's participation in and regulation of the market, not upon whether the commerce was moving in or out of a state. *Reeves v. Kelley,* 586 F. 2d 1230, 1233, n. 4 (8th Cir. 1978); *Hughes v. Alexandria Scrap,* supra, 426 U. S. at 808, n. 17.

The Supreme Court had earlier affirmed, in a memorandum opinion, a district court decision based expressly upon this distinction between proprietary and governmental activities. In *American Yearbook Co. v. Askew,* 339 F. Supp. 719 (M. D. Fla. 1972), *aff'd mem.,* 409 U. S. 904, 93 S. Ct. 230, 34 L. Ed. 2d 168 (1972), the Court upheld the constitutionality of a Florida statute that required all public printing of the State of Florida to be done in Florida. The district court stated that differing standards of constitutional review were applicable to "an exercise of a state's proprietary power, such as placing conditions on its own public contracts, and an exercise of governmental power such as a regulation of private industry by placing limitations on private contracts." *American Yearbook v. Askew,* supra, 339 F. Supp. at 722. The Court stated that while Commerce Clause restrictions were applicable to a State's governmental activities, proprietary activity was excluded from such review since when a State acts in a proprietary capacity, "it is subject to no more limitation than a private individual or corporation would be transacting the same business." *American Yearbook v. Askew,* supra, 339 F. Supp. at 721.

Central to the result reached in both *Hughes v. Alexandria Scrap,* supra, and *American Yearbook v. Askew,* supra, was this Court's determination that a State's participation in the market was not "a burden which the Commerce Clause was intended to make suspect." *Hughes v. Alexandria Scrap,* supra, 426 U. S. at 807. This determination was based upon the recognition that histori-

cally the Commerce Clause has been directed only at the regulatory or taxing activities of a State while acting in a sovereign capacity. The Commerce Clause was intended to prevent States from enacting retaliatory legislation that would interfere with the ability of willing parties to contract in interstate commerce. The Commerce Clause was never intended as a constraint upon the ability of an individual or of a State itself to freely enter the marketplace to contract with any party it so chooses on mutually acceptable terms. "Nothing in the purposes animating the Commerce Clause forbids a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Hughes v. Alexandria Scrap Corp.,* supra, 426 U. S. at 810. Explicit in this language of the Court is the recognition that the Commerce Clause is a constitutional restriction on the governmental activities of a State as distinguished from its proprietary functions. A State's determination as to whom and under what conditions it will sell its own manufactured product is an essential attribute of a State's sovereignty and fiscal autonomy not subject to Commerce Clause review. The framers of our Constitution did not intend to destroy all special relations between a State and its citizens, but rather to prevent a State from exercising control over the channels of interstate commerce. *Toomer v. Witsell,* 334 U. S. 385, 408-409, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948) (Frankfurter, J. concurring). One of the most basic characteristics of State sovereignty is that a State may limit its largesse to those persons who reside within its borders. The Commerce Clause has never required a State to open its treasury, sell its products, or extend its services on an equal

basis to both residents and nonresidents alike. To do so would undermine the concept of a State sovereignty that is a basic underpinning of our concept of federalism. The purpose of the Commerce Clause has always been to prevent the erection of trade barriers between States, rather than to impose a constitutional restriction on a State's ability to distribute its assets to its citizens.

The concurring opinion of Justice Stevens in *Hughes v. Alexandria Scrap,* supra, 426 U. S. 794 at 814-17, noted that earlier decisions of the Court concerning the Commerce Clause dealt with State activity which interfered with the natural operation of pre-existing commerce, while *Hughes v. Alexandria Scrap* presented a situation in which the State activity created new commerce. Justice Stevens reasoned that the Commerce Clause was intended to proscribe State interference in existing commerce, not State activity giving rise to new commerce. The Justice concluded:

> "I believe, a common and correct interpretation of the Commerce Clause as primarily intended (at least when Congress has not spoken) to inhibit the several States' power to create restrictions on the free flow of goods within the national market, rather than to provide a basis for questioning a State's right to experiment with different incentives to business." *Hughes v. Alexandria Scrap,* supra, at 426 U. S. 817.

Viewed in the perspective of Justice Stevens' concurring opinion, South Dakota, by entering the cement market, is creating new commerce, not restricting existing commerce. That commerce which is now claimed to be burdened, would never have existed in the first instance if South Dakota had not deemed it necessary to manufacture

and sell cement. South Dakota did not originally enter the cement market in 1920 with any discriminatory motive. The State's novel experiment in cement manufacturing was a direct State response to a critical economic problem within the State at a time when private initiative to meet the problem was lacking. *Eakin v. South Dakota Cement Commission,* 44 S. D. 268, 183 N. W. 651 (1921).

No decision of this Court has ever suggested that a State acting in a proprietary capacity in the marketplace is subject to greater Commerce Clause scrutiny in its actions than a private business acting in a similar capacity. Indeed prior decisions of this Court have held that a State, like any private individual, enjoys the right to determine those with whom it will deal and fix the terms under which it buys and sells in the marketplace. *Perkins v. Lukens Steel,* 310 U. S. 113, 117, 60 S. Ct. 869, 84 L. Ed. 206 (1940); *Atkins v. Kansas,* 191 U. S. 207, 24 S. Ct. 194, 48 L. Ed. 148 (1903); *see also American Yearbook v. Askew,* 339 F. Supp. 719, 721 (M. D. Fla. 1972), *aff'd mem.,* 409 U. S. 904 (1972). The South Dakota Cement Plant functions much like any of its private competitors except that it is directed by an appointed commission rather than a board of directors and its profits are paid to the State's citizens through general treasury rather than to private shareholders. *South Dakota Compiled Laws* 5-17-1 *et seq.* Nothing in the inherent structure of the South Dakota Cement Plant would lend support to the conclusion that any of its marketing decisions would be subject to Commerce Clause review to a greater extent than that of its private corporate competitors. Absent any anticompetitive motives, a private corporation is free to restrict its sales market and to choose its own customers. The Commerce

Clause grants no constitutionally guaranteed right to purchase from a State any more than it grants any similar guaranteed right to purchase from a private corporation. Both the proprietary activities of a State and acts of private parties are subject to the congressional power to regulate commerce, *National League of Cities v. Usery,* 426 U. S. 833, 853, n. 18, 96 S. Ct. 2465, 2475, 49 L. Ed. 2d 245, 259 (1976); *United States v. California,* 297 U. S. 175, 56 S. Ct. 421, 80 L. Ed. 567 (1936), neither requires independent justification under the Commerce Clause of the manner in which each selects to sell its own products in the absence of congressional action.

Petitioner maintains that this Court must subject South Dakota's activities to Commerce Clause review because of the adverse effect the State's actions have had upon Petitioner's business. The same argument was advanced by the Virginia scrap processor in *Hughes v. Alexandria Scrap Corp.,* supra. The Court answered this argument by concluding that not every action by a State that has the effect of reducing in some manner the flow of goods in interstate commerce is an action to which the Commerce Clause is concerned. It is also important to recognize that in the particular factual context of this case that the adverse impact caused Petitioner by South Dakota's action was as much the result of Petitioner's own business decision to purchase the bulk of its cement requirements from South Dakota rather than developing alternative sources of supply. Over the years Petitioner had, through its own choosing, relied on South Dakota to meet nearly all of its cement needs (App. 15). Petitioner's longstanding practice of purchasing from South Dakota does not somehow ripen into a constitutional right

to purchase when South Dakota can no longer produce enough cement to meet even the demands of its South Dakota customers. Certainly the Petitioner could not be heard to raise constitutional objections if other private suppliers found themselves unable to sell to the Petitioner. The result should not be different merely because South Dakota had sold to the Petitioner in the past.

Petitioner asserts that to apply the principles of *Hughes v. Alexandria Scrap Corp.*, supra, to this case, thereby allowing States to favor their own citizens in selling State-owned products, would materially disturb the federal free trade unit intended by the Constitution. As previously stated, a State acting in a proprietary capacity is still subject to the federal power to regulate commerce. *National League of Cities v. Usery*, 426 U. S. 833, 853, n. 18, 96 S. Ct. 2465, 2475, 49 L. Ed. 2d 245, 249 (1976); *United States v. California*, 297 U. S. 175, 56 S. Ct. 421, 80 L. Ed. 67 (1936). Whether it would be wise national policy to allow States to discriminate in favor of their own citizens in the sale of certain State-owned resources, is a question properly presented to Congress. Congress has not elected to regulate interstate commerce in cement. Thus the only question presented here is whether the Commerce Clause standing alone, in the absence of Congressional action, limits the right of a State to favor its citizens in the sale of its own manufactured product.

Far more troubling consequences would arise from the adoption of the Petitioner's interpretation of the Commerce Clause. Such a rule would make every decision of a State subject to an "*ad hoc* measurement of its affect on interstate commerce [that] would unduly interfere with state proprietary functions if not bring them to a standstill." *American Yearbook v. Askew*, 339 F. Supp. 719, 725, *aff'd mem.*, 409 U. S. 904. *See also* Note, 80 Harv. L. Rev. 1357, 1360-61. Courts would be required to examine a State's every purchasing, sales, pricing, employment or advertising decision, among many others, to assure that no resident bias was present; a particularly difficult task in an age of increasingly complex commercial transactions. Such an interpretation of the Commerce Clause would impair the special relationship that has always existed between a State and its citizens in the distribution of State assets and bring about a result unintended by the framers of our Constitution.

Finally, it is necessary to examine the precedents cited by the Petitioner to determine if these decisions lend any support to the interpretation of the Commerce Clause urged by the Petitioner. The Petitioner relies on a series of decisions of this Court from *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911) to *Raymond Motors Transport, Inc. v. Rice*, 434 U. S. 429, 98 S. Ct. 787, 54 L. Ed. 2d 664 (1978) where this Court struck down State attempts to either directly or indirectly interfere with the private channels of interstate commerce. All of these cases relied upon by the Petitioner address the specific prohibition that a State shall not restrict a private citizen in the interstate marketing of his property. No case relied upon by the Petitioner holds that a State is regulating commerce when it sells its own manufactured product.

The Petitioner argues that the action of South Dakota in the present case is one of the clear examples referred to by this Court in *City of Philadelphia v. New Jersey*,

437 U. S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978) as being per se invalid. In *City of Philadelphia v. New Jersey,* supra, the State of New Jersey passed a law prohibiting the importation into the State of most solid or liquid wastes that originated outside New Jersey. Applying the test outlined in *Pike v. Bruce Church, Inc.,* 397 U. S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970), this Court held that New Jersey could not prevent the shipment of privately owned articles of trade in interstate commerce. Significantly, the Court holding was expressly restricted to commerce in privately owned articles of trade. The Court observed:

> "We express no opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state owned resources. . . ." [citations omitted] 437 U. S. at 627, n. 6.

Petitioner also relies on *Hicklin v. Orbeck,* 437 U. S. 518, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978), which presented a challenge to the "Alaska Hire" law under the Privileges and Immunities Clause. The Court stated that a State's ownership of property with which a statute is concerned is often "the crucial factor" to be considered in determining whether the Privileges and Immunities Clause is violated. *Hicklin v. Orbeck,* supra, 437 U. S. at 529. The Court found that the Clause was violated because "Alaska had little or no *proprietary interest* in much of the activity swept within the ambit of Alaska Hire;" and that therefore the act went "far beyond the degree of resident bias Alaska's ownership of oil and gas can justifiably support." *Hicklin v. Orbeck,* supra, 437 U. S. at 529 and 534. (Emphasis supplied.) Alaska had attempted to use its ownership of gas and oil as a basis

to act as more than a mere participant in the market, but as a regulator of the employment practices of all private parties with whom the State contracted. By contrast, the nature of South Dakota's proprietary interest in its cement is clear and is based on ordinary property law concepts. South Dakota makes no attempt to use its ownership of cement to regulate the employment practices or any other conduct of any of the parties with which it deals. Unlike Alaska, South Dakota acts as a participant in the market, not as a regulator of private conduct of its customers.

II.

The decision of this Court in Hughes v. Oklahoma is not decisive of the issue presented in this case.

In light of this Court's remand of this case to the Eighth Circuit Court of Appeals for further consideration in light of *Hughes v. Oklahoma,* 441 U. S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979), it is necessary to discuss this recent Commerce Clause decision in greater detail.[5] *Hughes v. Oklahoma,* supra, involved an Oklahoma statute wihch prohibited the transportation or shipment of natural minnows seined or procured from Oklahoma waters for sale outside the State of Oklahoma. Hughes was convicted of violating the Oklahoma statute by tran-

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5 *See also* W. Hellerstein, *Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources,* 1979 Sup. Ct. Rev. 51 (1980). The author also focuses his discussion on the issue of the application of the Commerce Clause to State-owned resources as presented in this case. See Hellerstein, at 73-84.

sporting the minnows he had purchased from an Oklahoma dealer to his place of business in Texas. On appeal to the United States Supreme Court, the Court was squarely presented with the issue of whether a State indeed "owned" all wild animals within the State such that it could constitutionally control and regulate not only the taking of game within its borders, but more broadly, the control and regulation of game that had been lawfully reduced to private possession. Thus the central issue before the Court in *Hughes v. Oklahoma,* supra, was whether the State could legitimately claim an ownership interest in wild game after its possession by private citizens.

In deciding this issue the Supreme Court was confronted with a long line of seemingly conflicting precedents. The foremost early decision was *Geer v. Connecticut,* 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793 (1896). In *Geer,* supra, the Supreme Court considered a State statute that forbade the transportation beyond the State of birds that had been lawfully killed within the State. The Court's majority opinion upholding the statute rested upon a conviction grounded in early common law that the State owned all wild animals within its borders in common with its citizens. It followed then that this continued State ownership "imports the right to keep the property if the sovereign so chooses, always within its jurisdiction for every purpose." *Geer,* supra, at 161 U. S. 530.

Faced with this clear pronouncement of State ownership, the Supreme Court in *Hughes v. Oklahoma,* supra, next proceeded to examine its subsequent decisions. The Court noted that each subsequent decision eroded the *Geer* analysis to the point of virtual extinction. The Court then

concluded that the *Geer* analysis had not stood the test of time and therefore expressly overruled it. The "ownership" language in *Geer* and earlier cases was termed a 19th Century legal fiction. The Court stated that challenges under the Commerce Clause of State regulation of wildlife stand on the same footing as challenges to State regulations of other natural resources. The Court's holding was succinctly stated in the last sentence of the majority opinion, citing the dissenting opinion of Justice Field in *Geer,* supra, that "when a wild animal becomes an article of commerce . . . its use cannot be limited to the citizens of one state to the exclusion of citizens of another state." *Geer,* supra at 161 U. S. at 538 (Field, J. dissenting).

Thus *Hughes v. Oklahoma,* supra, clearly stands for the proposition that a State may no longer attempt to claim a special ownership interest in wild game held by citizens within its borders. The legal fiction of State ownership in wild animals lawfully killed and reduced to private possession is discarded. Once wild game rests in private hands, the State's scope of permissible regulations under the Commerce Clause is only the same as that permissible under precedents governing all other types of commerce. See e. g., *Pike v. Bruce Church,* 397 U. S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970).

A proper examination of the facts of *Hughes v. Oklahoma,* supra, reveals that this decision does not represent a departure by the Supreme Court from its earlier decision in *Hughes v. Alexandria Scrap Corp.,* supra. *Hughes v. Oklahoma* dealt with a direct State attempt to regulate a natural resource of a State after it had been re-

duced to private possession. A fundamentally different type of State activity is involved in the present case. The State of South Dakota is acting in a purely proprietary capacity in participating in the market through the sale of its own manufactured product.

The dominant issue facing the Supreme Court in *Hughes v. Oklahoma,* supra, was whether or not a State could still lay claim to an ownership interest in wildlife within its border after the game had come into private hands. The significance of the case lies in the fact that the Supreme Court abandoned the legal fiction of such State ownership. In the present case there is no issue of ownership. The State of South Dakota relies on simple fact, not legal fiction, to claim an ownership interest in its own manufactured product. Its ownership of cement is based on conventional property law concepts, not upon a contrived legal fiction. Similarly, South Dakota has not maintained that through some legal fiction its ownership interest in cement continues after the product comes into the possession of private parties such that it could thereafter prohibit sales to nonresidents. South Dakota did not restrict the private sale of cement by South Dakota residents to nonresident buyers. Rather, South Dakota maintains that until the State sells its product, thereby surrendering its ownership interest, the State is free to restrict its own sales in accordance with the legislative mandate of its creation and the Constitution of the State of South Dakota.

The holding of the Supreme Court in *Hughes v. Oklahoma,* supra, is supportive of South Dakota's position in the present case. The precise holding of *Hughes v. Oklahoma* was stated by the Court in the final sentence of the majority opinion wherein the Court quoted the dissenting opinion in *Geer v. Connecticut,* 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793 (1896), wherein Justice Field stated:

> "*When* any animal, whether living in the waters of the state or in the air above, is lawfully killed for the purpose of food or other uses of man, it *becomes an article of commerce* and its use cannot be limited to the citizens of one state to the exclusion of citizens of another state." *Geer v. Connecticut,* supra, at 161 U. S. 538. (Emphasis supplied.)

Thus *Hughes v. Oklahoma* stands for the proposition that *when* a natural resource such as wildlife comes into private hands it becomes an *article of commerce* and a State may not limit its use to its own citizens to the exclusion of nonresidents. The Court of Appeals decision below is entirely consistent with his holding. South Dakota in the exercise of its property rights in its own manufactured product may choose to sell to its own citizens before selling to nonresidents in accordance with the public purpose for which it was created. *When* its product has been sold, however, it becomes an *article of commerce* and the State of South Dakota could not thereafter restrict its movement in interstate commerce.

CONCLUSION

The Eighth Circuit Court of Appeals correctly held that the Commerce Clause does not limit the State of South Dakota's power to choose whether, to whom, and on what conditions it sells its State-owned and manufac-

tured cement. The decision is in accord with the previous decisions of this Court in *Hughes v. Alexandria Scrap Corp.*, supra, and *Hughes v. Oklahoma,* supra.

It is therefore respectfully submitted that the decision of the Eighth Circuit Court of Appeals be affirmed.

March, 1980.

Respectfully submitted,

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